

1 Honorable Robert S. Lasnik
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7 IN THE UNITED STATES DISTRICT COURT
8 IN AND FOR THE WESTERN DISTRICT OF WASHINGTON

9 YESENIA PACHECO, LUIS LEMUS,
10 and S.L.P., minor child, by and through
11 her Guardian ad Litem, Brian Comfort,

12 v.

13 UNITED STATES OF AMERICA,

No. 2:15-cv-01175

PLAINTIFFS' RESPONSE TO
DEFENDANT'S BRIEF CONCERNING
PERIODIC PAYMENTS

NOTED ON MOTION CALENDAR:
NOVEMBER 18, 2020

14 Plaintiffs provide this brief to advise the Court of the infirmities in the Defendant's brief.
15

16 1. Defendant's plan is inadequate because it fails to take into account SLP's costs
and attorney fees.

17 Defendant states:

18 A combination of \$5.25 million in initial seed money and an annuity in the amount
19 of \$2.25 million will create and fund the reversionary trust and provide for all of
20 SLP's anticipated future medical care as set forth in Plaintiffs' life care plan at trial.

21 Dkt. 212, p. 10. Defendant's proposal is inadequate and unworkable. It fails to take into account
22 SLP's attorney fees in the amount of \$1,875,000, and that the Plaintiffs have incurred over
23 \$142,000 in litigation costs. Unless the Defendant volunteers to pay Plaintiffs' Counsel
24 \$2,000,000 for fees and costs, for this reason alone the Court should reject Defendant's proposal.

25 2. Defendant does not request periodic payments. The Court has satisfied its
obligations under RCW 4.56.260.

PLAINTIFFS' PROPOSAL FOR
PERIODIC PAYMENTS - 1



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1 Defendant states “the United States is prohibited from making periodic payments under
 2 the Federal Torts Claim Act (the “FTCA”). Dkt. 212, p. 2. Defendant does not want, and cannot
 3 make, periodic payments. The Court should reject Defendant’s proposal for periodic payments.
 4 Defendant cited to RCW 4.56.260 not because it wants periodic payments, but because it wants
 5 the Court to force a Medical Reversionary Trust onto Plaintiffs against their will. The medical
 6 reversionary trust is not in the best interest of SLP and not allowed by RCW 4.56.260(2).
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8 3. RCW 4.56.260 does not allow a medical reversionary trust.

9 Defendant states “Under the FTCA, the United States is liable in tort actions ‘in the same
 10 manner and to the same extent as a private party under like circumstances,’ under Washington
 11 law.” Dkt. 212, page 3. This is true. However, never in the history of Washington state has a
 12 private party Defendant persuaded a court to force a medical reversionary trust onto a Plaintiff
 13 against the Plaintiff’s will. No Washington court has ever done what the Defendant asks this
 14 Court to do, which is to interpret RCW 4.56.260 to justify forcing a medical reversionary trust
 15 onto Plaintiffs.

16 4. The Defendant’s proposal for a medical reversionary trust is not in the best
 17 interest of SLP.

18 Whether following RCW 4.56.260 or the court’s “inherent authority”, the Court must act
 19 in the interest of SLP. RCW 4.56.260(2); *Hull by Hull v. United States* 971 F.2d 1499 (1992),
 20 (“the district court has the inherent authority to order that Lee’s damages be paid in the form of
 21 a fully reversionary trust if it concludes that is in Lee’s best interest . . . the court should consider
 22 what form or structure of damages best serves Lee’s interests from Lee’s perspective only . . .
 23 The award is to compensate Lee, and Lee only.”)

24 Defendant’s attempt to argue that its proposal for a medical reversionary trust is “SLP is
 25 a minor who is completely dependent on her parents and may need the Court’s protection to
 26



1 create a reversionary trust to ensure any funds earmarked for her future medical care remain at
 2 her disposal for her future care and treatment.” Dkt. 212, p. 7. However, the Plaintiffs’ proposal
 3 of a Special Needs Trust and a Structured Settlement satisfies this concern. Plaintiffs’ proposal
 4 does not interfere with SLP’s eligibility for needs-based government benefits, and better
 5 provides for SLP’s interests.
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7 Defendant insinuates that SLP’s parents Yesenia Pacheco and Luis Lemus are evil,
 8 malevolent, or untrustworthy:

9 a reversionary trust avoids conflicts of interest inherent in caring for incapacitated
 10 people like SLP, in which the beneficiaries of excess life care funds are the same
 11 people responsible for making life-or-death decisions. *Hull*, 971 F.2d at 1503 (10th
 12 Cir. 1992) (noting that plaintiff’s life “may be compromised because the existing
 13 trust agreement provides that the parents inherit the entire trust assets if [plaintiff]
 14 dies while in their care) . . . Here, testimony at trial revealed that Ms. Pacheco
 15 provides the majority of her care for her daughter, including scheduling and
 16 attending medical visits. However, Ms. Pacheco also testified that she is not a
 17 United States citizen, and other testimony and evidence at trial suggest neither her
 18 nor Mr. Lemus are in the best position to ensure the protection of SLP’s future
 19 damages award. To date, the government is unsure who Plaintiffs intend to oversee,
 20 manage, and/or administer SLP’s future damages award.

21 Dkt. 212, pages 7-8. The Court heard testimony from two of SLP’s health care providers: Dr.
 22 Kadet and Dr. Lopez. Their testimony is that SLP is blessed with loving, caring, devoted, and
 23 resourceful parents. Defendant has no basis for its assertion that there is a conflict of interest.
 24 Unlike *Hull*, there is no evidence that Yesenia and Luis intend to harm or neglect their child and
 25 abscond with the money. The *Hull* court described the relationship of the disabled child to his
 26 parents as follows:

27 the record indicates that the court wanted to establish a trust that would revert fully
 28 to the government upon Lee’s death. Apparently, the court desired such a
 29 reversionary provision because it was concerned that Lee’s safety would be in
 30 jeopardy if his parents were to receive the unspent portion of this damage award
 31 upon Lee’s death.

1 To suggest that Yesenia and Luis should be forced into a medical reversionary trust because she
2 is not a citizen of the United States is baseless. Nothing in the evidence before the Court supports
3 Defendant's contention.

4 5. Conclusion.

5 6. The Court should reject Defendant's request to force the medical reversionary trust onto
7 Plaintiffs and find that the Defendant does not seek period payments. Plaintiffs will establish a
8 special needs trust and structured settlement with or without a court order.

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10 Dated this 19th day of November, 2020.

11 MAXWELL GRAHAM, P.S.

12 ALVAREZ LAW

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